IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
LAKE COUNTRY INVESTMENTS, Limited Liability Company,	)	**Case No. 99-20287**
	)	
Debtor.	)	
_____	)	
	)	
	)	
AGINCOURT, L.L.C., an Idaho Limited Liability Company, and WEST WOOD INVESTMENTS, INC., a Washington corporation,	)	
	)	
Plaintiffs,	)	
	)	
vs	)	**Case No. 00-6064**
	)	
ROGER STEWART, individually, and PATTY STEWART and their marital community; PAUL STEWART JR., individually, and CARRIE STEWART and their marital community; ARROW POINT DEVELOPMENT CO., INC., an Idaho corporation, JOHN NOYES and ALICIA NOYES, individually and their marital community,	)	**MEMORANDUM OF DECISION AND ORDER**
	)	
Defendants.	)	
	)	

ARROW POINT DEVELOPMENT COMPANY, INC., an Idaho corporation,

Counter-claimant,

vs

EDWARD FU, a foreign citizen; AGINCOURT, L.L.C., an Idaho Limited Liability Company; WEST WOOD INVESTMENTS, INC., a Washington corporation; WOOD WEST HOLDINGS, LTD., a Foreign corporation; FORTRESS, L.L.C., an Idaho Limited Liability Company; and DOES 1 through 50,

Counter-defendants.

Michael M. Feinberg, Seattle, Washington, and Robert J. Fasnacht, Coeur d'Alene, Idaho, for Plaintiffs/Counter-defendants West Wood Investments, Inc. and Agincourt, L.L.C., and Counter-defendants Fortress, L.L.C. and Edward Fu.

John E. Miller, Coeur d'Alene, Idaho, for Defendants Roger and Patty Stewart, Paul and Carrie Stewart, and for Defendant/Counter-claimant Arrow Point Development Co., Inc.

R. Wayne Sweney, Coeur d'Alene, Idaho, for Defendants John and Alicia Noyes

I. INTRODUCTION

A. The chapter 11

On March 17, 1999, West Wood Investments, Inc., a Washington corporation ("West Wood") filed an involuntary petition under chapter 11 against Lake Country

Investments, LLC, an Idaho limited liability company ("Lake Country" or "Debtor"). West Wood is a creditor of Lake Country. It is also the managing member of Agincourt, L.L.C., an Idaho limited liability company ("Agincourt"). Agincourt is a managing member of Lake Country. The only other member of Lake Country, and also a managing member, is Arrow Point Development Company, Inc., an Idaho corporation ("APDC").

The Court entered an order for relief regarding Lake Country on April 16, 1999. On July 8, 1999, a chapter 11 trustee, Joseph A. Esposito ("Trustee" or "Esposito") was appointed. West Wood filed a plan, and brought the same forward for confirmation. Ultimately, that plan was withdrawn. Presently, no plan is before the Court to reorganize the affairs of Lake Country or to liquidate its assets. This situation is due, at least in part, to the unsettled nature of the various adversary proceedings before the Court.

B. The adversary proceedings

Agincourt and West Wood filed suit on January 12, 2000, in the District Court for the First Judicial District of the State of Idaho, Kootenai County. This action was brought against APDC and its principals, members of the Stewart family ("Stewarts"). The complaint alleged four causes of action: fraud, negligent misrepresentation, violation of Idaho securities laws, and violation of Idaho consumer protection statutes.

On February 8, 2000, Agincourt and West Wood filed an amended complaint adding as defendants John and Alicia Noyes ("Noyes") and asserting two additional causes of action: one was asserted against Noyes and APDC alleging fraudulent

conveyance under Idaho statute, and the other was asserted against APDC, Noyes and Stewarts for illegal distribution of APDC's corporate assets under Idaho law.

On February 15, Noyes removed this lawsuit to this Court. West Wood and Agincourt thereafter moved the Court for a partial remand of the four original causes of action to the state court. That motion was taken under advisement following briefing and hearing.

Noyes moved to dismiss the two causes of action against Noyes set forth in the amended complaint under the Idaho fraudulent conveyance and business corporation statutes. This motion was also taken under advisement.

Prior to the removal of the instant action, Esposito had filed a separate action, as an original adversary proceeding before this Court, on February 10, 2000, Case No. 00-6057 (the "Esposito Adversary"). The Esposito Adversary is brought solely against Noyes. It also asserts causes of action under Idaho fraudulent conveyance and business corporation statutes. In addition, it seeks equitable subordination, and lien avoidance of Noyes' secured claims against Lake Country. The Court presently has under advisement a motion of Noyes for summary judgment in the Esposito Adversary.

Immediately prior to the motion for partial remand, APDC and Stewarts answered and asserted affirmative defenses, and APDC also asserted counterclaims against West Wood, Agincourt, Fortress, LLC, an Idaho limited liability company ("Fortress"), Edward Fu, a foreign citizen ("Fu"), and Wood West Holdings, Ltd., a

foreign corporation ("WW Holdings").[1] APDC makes several allegations regarding the formation and control of these various entities, concluding with the allegation that they are all shells controlled by Fu and merely his "alter egos."

The counterclaim alleges five causes of action (fraud, negligent misrepresentation, breach of fiduciary duties and covenant of good faith and fair dealing, interference with business prospects, and equitable relief.) Fortress has moved to dismiss the counterclaim. That motion has also been taken under advisement.[2]

II. DISCUSSION AND DISPOSITION

A. Motion for partial remand

After Noyes removed the instant adversary proceeding, Agincourt and West Wood moved for partial remand of their first four causes of action against APDC and Stewarts. Noyes does not oppose that motion. However, APDC and Stewarts resist remand.

1. The removal

Noyes timely removed the state court suit to this Court, as the removal was filed within 30 days of service of the amended complaint on Noyes. *See*,

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[1] Only West Wood and Agincourt are plaintiffs, and thus proper counter-defendants under Fed.R.Civ.P. 13; Fed.R.Bankr.P. 7013. No request for joinder of additional parties was made under Rule 13(h), and Rules 19 and 20 incorporated thereby. Fortress characterizes the counterclaim against it as a third party complaint. *See,* Fed.R.Civ.P. 14(a); Fed.R.Bankr.P. 7014.

[2] Fu has also moved to dismiss the counterclaim. That motion is scheduled for hearing on July 18.

Fed.R.Bankr.P. 9027(a)(3). APDC and Stewarts did not seek removal of the action at any time.

Noyes allegedly removed the action pursuant to 28 U.S.C. §§ 1441 and 1452(a). Notice of Removal, at 1. Section 1441 is the general provision addressing removal of actions to federal court. Section 1452 is a more pointed provision dealing with removal of claims or causes of action related to bankruptcy cases. That section provides:

> **Removal of claims related to bankruptcy cases.**
>
> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a). The jurisdictional prerequisite for removal under § 1452 is § 1334 which provides:

> **Bankruptcy cases and proceedings.**
>
> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(a), (b).

While §§ 1452(a) and 1334 speak of the district court's jurisdiction, "Bankruptcy courts in general, and the Bankruptcy Court in this District in particular, assume jurisdiction over cases by reference from the district courts. 28 U.S.C. § 157(a); Amended General Order No. 38." *In re Ransom*, 00.1 I.B.C.R. 50, 51 (Bankr. D. Idaho 2000). *See also, R&R Hardwood Floors v. Action Mortgage Co. (In re Pond)*, 99.3 I.B.C.R. 115, 117 (Bankr. D. Idaho 1999).

The nature of the claims asserted against Noyes and the allegations of Noyes as removing party make it clear that § 1452(a) was the actual predicate for removal, not § 1441.

In addition, the action was not removed to the District Court, but instead to this Court. Making the bankruptcy court the receiving court of a removed action requires federal jurisdiction under § 1334, and automatic reference under § 157(a). If removal was actually effected pursuant to § 1441, jurisdiction must be founded upon § 1331, *see* § 1441(a) - (c), and would land the removed case in front of the district court.[3] This makes the connection of the present removal to
§ 1452 all the more obvious.

[3] The Court notes that there is no federal question asserted under § 1331, nor is federal diversity jurisdiction alleged under that section. Diversity jurisdiction is debated by the parties, but only because Noyes referenced § 1441 in removing the action. If diversity jurisdiction were implicated, there would be serious questions as to whether complete diversity exists.

The Court concludes that, under all the circumstances, § 1441 is irrelevant to the removal by Noyes.[4]

2. The motion for partial remand

The motion of West Wood and Agincourt for partial remand is asserted under § 1447(c). However, there is a separate, and more apt, statutory basis for seeking remand in § 1452(b), which provides:

> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1452(b).

Section 1452 "comfortably coexists" with the general federal removal provisions. *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128-29, 116 S.Ct. 494, 497, 133 L.Ed.2d 461 (1995). The Court concludes that § 1452(b) must be evaluated first and foremost. If remand is appropriate under § 1452(b), the question of whether it is also appropriate under § 1447(c) is of no consequence.[5]

In addressing this issue, it is appropriate to note that:

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[4] The Court notes another feature of the removal statutes: while § 1441 and related provisions of title 28 contemplate removal of the "action," § 1452(a) allows for removal of "any claim or cause of action in a civil action" if there is § 1334 jurisdiction over such claim or cause of action. Noyes could have removed only the fifth and sixth causes of action asserted in the amended complaint.

[5] The Court recognizes that West Wood and Agincourt also make a separate argument under § 1447(c) regarding award of fees. This contention will be addressed later.

> This "any equitable ground" remand standard [of § 1452(b)] is an unusually broad grant of authority. It subsumes and reaches beyond all of the reasons for remand under nonbankruptcy removal statutes. *See Chambers v. Marathon Home Loans (In re Marathon Home Loans)*, 96 B.R. 296, 299-300 (E.D. Cal. 1989).

McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999).

3. Resolution

The Court in *St. Vincent's Hospital v. Norrell (In re Norrell)*, 198 B.R. 987 (Bankr. N.D. Ala. 1996) analyzed the several issues presented when proceedings are removed to the bankruptcy court under § 1452(a). It initially observed:

> In every "removed" action there are four probable issues. The threshold issue is whether the "removal" was proper. If it was, there are three additional issues. These are: (1) should the receiving court abstain from hearing the matter; (2) should the receiving court remand the matter; or (3) should the receiving court retain the matter. Case facts dictate whether any or all of these options should be considered, but in every case the first inquiry is whether the action was properly removed.
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> . . .
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> If the court determines that it does not have jurisdiction over the cause of action under section 1334, a retroactive[6] determination must be made that the cause of action was not subject to removal under section 1452(a). The action is then "remanded" to its original court. *In re Baltic Assocs.*, 149 B.R. 93, 95 (Bankr. E.D. Pa. 1993). *See also In re Fisher*, 151 B.R. 895, 897 (Bankr. N.D. Ill. 1993) (bankruptcy court did not have jurisdiction over non-debtor class members' state law claims).
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> If the court determines that there is jurisdiction the court may (1) abstain from hearing the action which in effect sends the action

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[6] The determination is necessarily "retroactive" because the process of removal under Rule 9027 is for practical purposes automatic upon the filing of the required pleadings and notices. The Court is not asked or required to make an initial, pre-removal determination as to the jurisdictional propriety of the removal.

> back to its original court, (2) may remand the action directly to its original court or (3) retain the action.

198 B.R. at 992, 993.

West Wood and Agincourt argue that the Court lacks such subject matter jurisdiction under § 1334(b) over the first four causes of action, thus requiring their remand to state court.

a. Remand for lack of jurisdiction

The jurisdictional structure of the bankruptcy courts is based upon § 1334(a) and § 1334(b). The Court's jurisdiction over cases, § 1334(a), is not here at issue. Its alleged jurisdiction over the first four causes of action must lie under § 1334(b). This Court has stated:

> "Related to a case under title 11," "arising under title 11," and "arising in a case under title 11" are terms of art. The Ninth Circuit recently stated:
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> > "Congress used the phrase 'arising under title 11' to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11.... The meaning of 'arising in' proceedings is less clear, but seems to be a reference to those 'administrative' matters that arise only in bankruptcy cases. In other words, 'arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy."
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> *Eastport Assoc. v. City of Los Angeles (In re Eastport Assoc.)*, 935 F.2d 1071, 1076 (9th Cir. 1991) (quoting *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987)). "Related to a case under title 11," in contrast, is a much broader term.
>
> > "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is

> whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. [citations omitted]. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate."
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> *Fietz v. Great Western Savings (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis in original)).

Bowen Corporation, Inc. v. Security Pacific Bank Idaho, F.S.B. (In re Bowen Corporation, Inc.), 150 B.R. 777, 782, 93 I.B.C.R. 54, 56-57 (Bankr. D. Idaho 1993). *See also, Maitland v. Mitchell (In re Harris Pine Mills)*, 44 F.3d 1431, 1434 -36 (9th Cir. 1995); *Bethlahmy, IRA v. Kuhlman (In re ACI-HDT Supply Co.)*, 205 B.R. 231, 234-35 (9th Cir. BAP 1997); *R & R Hardwood v. Action Mortgage Co. (In re Pond)*, 99.3 I.B.C.R. 115, 117 (Bankr. D. Idaho 1999).[7]

The burden of establishing subject matter jurisdiction is on the removing party, here Noyes. *Redwood Theatres, Inc. v. Festival Enterprises*, 908 F.2d 477, 479, (9th Cir. 1990). *Accord, Pond*, 99.3 I.B.C.R. at 116, citing *Trentcosta v. Frontier Pacific Aircraft Industries, Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987).

Noyes has made certain arguments in regard to § 1334(b) jurisdiction over the last two causes of action in the amended state court complaint. But that issue is

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[7] *See generally, Celotex Corp. v. Edwards*, 514 U.S. 300, 307-09, 115 S.Ct. 1493, 1498-99, 131 L.Ed.2d 403 (1995) (citing *Pacor* with approval, though not explicitly adopting its relatedness test, and noting this test has been adopted by a majority of circuits.)

essentially uncontested. West Wood and Agincourt are not seeking to remand those portions of the action, and agree this Court has jurisdiction over those two counts. Reply Memorandum in Support of Motion for Partial Remand, Doc. No. 24, at 7-8. The real issue presented concerns this Court's jurisdiction over the first four causes of action, which do not involve Noyes.[8]

APDC and Stewarts argue in favor of this Court's § 1334(b) "related to" jurisdiction over the original four causes of action, even though they did not seek to remove that suit. The Court concludes that these parties have assumed the burden which would otherwise borne by the "removing party" to establish that jurisdiction is proper.[9]

The first four causes of action asserted in this matter are (1) that APDC and Stewarts made false and fraudulent representations to West Wood and Agincourt; (2) that APDC and Stewarts made "negligent misrepresentations" to West Wood and Agincourt; (3) that APDC and Stewarts violated certain subdivisions of Idaho Code § 30-1403 and § 30-1446; and (4) that the alleged misrepresentations and related conduct of APDC and Stewart constituted unfair and deceptive acts and practices in

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[8] The Court agrees that the claims must be separately analyzed. *In re Best Reception Systems, Inc.*, 220 B.R. 932, 946 (Bankr. E.D. Tenn. 1998).

[9] West Wood and Agincourt argue that APDC and Stewarts did not timely remove the state court action to this Court, and that they should therefore not be heard to protest its remand. However, they are parties to this adversary proceeding. The fact that APDC and Stewarts did not (and could not now) timely remove the action does not prohibit them from commenting on the request of the plaintiffs to remand.

violation of the Idaho Consumer Protection Act. West Wood and Agincourt want an award of damages against APDC and Stewarts on these counts.

The Court concludes that these four causes of action, asserted entirely among non-debtor parties and are based solely upon state law, do not "arise in" or "arise under" title 11. The Court further concludes, contrary to APDC's contentions, that they do not constitute "related to" proceedings. The Debtor, Lake County, is not a party to any of these causes, nor is its property at issue. The outcome of the litigation could well have an impact on the relative rights and liabilities of the members of the Debtor, Agincourt and APDC, as against one another. But adjusting the financial relationship between these litigants does not per se implicate Lake Country's property or obligations. If the outcome of this litigation changes the extent of the interests assertable by any of the litigants against the Debtor (as opposed to assertable against one another), this Court is certainly capable of dealing with that result for purposes of whatever bankruptcy proceedings may then be pending.

An argument could certainly be constructed that various possible outcomes in the suit might, like a series of dominos, lead to some sort of an impact on Lake Country's reorganization or liquidation. But this type of argument ends up reading the "could conceivably have any effect" language of the case law[10] so expansively that frankly little would remain outside the bankruptcy court's § 1334(b) reach. The Court does not agree with such an all-encompassing reading of the "related to" jurisdictional

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[10] *See, e.g., Fietz*, 852 F.2d at 457, cited in *Bowen*, *supra*.

grant. *Accord, Celotex Corp v. Edwards*, 514 U.S. at 308, 115 S.Ct. at 1499 ("related to" jurisdiction is "comprehensive" but not "limitless").[11]

For these reasons, the Court concludes it lacks subject matter jurisdiction over the first four causes of action. The same shall be remanded to the state court. *Accord, Pond*, 99.3 I.B.C.R. at 117 (remanding racketeering claims as to defendants other than debtor the outcome having "no demonstrable effect" on the case); *ACI-HDT Supply*, 205 B.R. at 237 (actions by nondebtors for monetary damages

[11] APDC and Stewarts also argue that the first four claims fall under § 157(b)(2)(A) and/or (O), establishing their status as core proceedings. There are two problems with this.

First, it leaps over the threshold question. The Court must have jurisdiction before addressing whether that jurisdiction is core or non-core. Second, as *Bowen* recognizes, state law claims that do not specifically fall under § 157(b)(2)(B) - (N) are related proceedings and, thus, non-core even if arguably within the literal wording of the two "catch-all" subsections. 150 B.R. at 784-85, 93 I.B.C.R. at 59 (citing, in part, *Piombo Corp. v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159, 162 (9th Cir. 1986)). *See also, ACI-HDT Supply*, 205 B.R. at 236; *accord, Best Reception*, 220 B.R. at 946, n.19 (liberal construction of (b)(2)(A) and (O) dilute the mandate of *Marathon*, and such subsections should be used with care and caution).

from other nondebtors not within the non-core or "related to" jurisdiction).[12]

b. Remand on "any equitable ground"

Norrell notes that the court should evaluate discretionary and mandatory abstention in connection with the removed action, and that § 1334(c), which governs abstention, and § 1452(b) are "kindred statutes." 198 B.R. at 997. This approach finds support in *Bowen*, in which the Court addressed § 1334(c) and, finding the action subject to both mandatory and discretionary abstention, ordered it "remanded to the state court pursuant to § 1452(b)." 150 B.R. at 786, 93 I.B.C.R. at 60. Such an approach is also consistent with the "unusually broad grant" of § 1452(b) as recognized in *McCarthy*, 230 B.R. at 417.

[12] In resolving this issue, an additional contention must be addressed. APDC and Stewarts assert that their counterclaim against Agincourt and West Wood (and others) falls well within this Court's § 1334(b) jurisdiction, and "confirms" that plaintiffs' claims do as well. However, in resolving the question of the propriety of removal and the appropriateness of remand, the Court reviews solely the allegations and contentions of the complaint. *Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 10, 103 S.Ct. 2841, 2845-47, 77 L.Ed.2d 420 (1983); *Takeda v. Northwestern National Life Ins. Co.*, 765 F.2d 815, 822 (9th Cir. 1985).

i. Mandatory abstention

The requirements for mandatory abstention are set forth in § 1334(c)(2).[13] Seven elements must be established for mandatory abstention: (1) a timely motion is filed by the party seeking abstention; (2) the action involves purely state law questions; (3) the action is a "related to" proceeding; (4) absent bankruptcy, there is no independent federal jurisdiction over the action; (5) the action is commenced in state court; (6) the state court action may be timely adjudicated; and (7) a state forum of appropriate jurisdiction exists. *Bertagnole v. Jouglard Sheep Co., Inc. (In re Bertagnole)*, 99.3 I.B.C.R. 105, 106 (Bankr. D. Idaho 1999); *Gonzales Construction Co. v. Fulfer (In re Fulfer)*, 159 B.R. 921, 923, 93 I.B.C.R. 246, 247 (Bankr. D. Idaho 1993); *Bowen*, 150 B.R. at 781-82, 93 I.B.C.R. at 56-58.

Mandatory abstention would appear to be warranted even assuming APDC and Stewarts are correct in asserting that the first four causes of action fall within the "related to" jurisdiction of the Court. The critical impediment, however, arises under the first element: there must be a timely motion by a party seeking such relief. There

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[13] This section provides:

> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

here was no motion for mandatory abstention by West Wood and Agincourt[14] and the Court may not consider it. *Id.*; *see also, Norrell*, 198 B.R. at 987.

ii. Discretionary abstention

Bowen also sets forth the elements of discretionary abstention under § 1334(c)(1):

> The Ninth Circuit has established 12 factors to be evaluated in determining whether discretionary abstention is appropriate:
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> > "(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted 'core' proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties."
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> *Christensen v. Tuscon Estates, Inc. (In re Tuscon Estates, Inc.)*, 912 F.2d 1162, 1167 (9th Cir. 1990) (quoting *In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

150 B.R. at 784, 93 I.B.C.R. at 58.

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[14] This is not the case with Fortress, which asks for mandatory abstention as an alternative to dismissal of APDC and Stewarts' claims against it.

Virtually all these factors favor discretionary abstention of the first four causes of action. There are no parties other than nondebtors (factor 12); a right to jury trial has been asserted (factor 11); there is a state court proceeding available (factor 4); state law issues clearly predominate, indeed there are no bankruptcy law issues (factor 2); it is feasible to allow the state court to enter judgments on the state law issues with enforcement, to the extent necessary, left to this Court (factor 8).

As noted in *Bowen*, 150 B.R. at 784-85, 93 I.B.C.R. at 59, whether the proceeding is core or non-core impacts several elements of the *Tuscon Estates*' test. Here, if one assumes (for the sake of argument and contrary to the conclusion reached *supra*) that the Court has jurisdiction over the first four causes of action, such jurisdiction would be necessarily premised on the "related to" aspect of § 1334(b) and those causes are non-core. Thus, the seventh factor favors abstention. Additionally, since § 157(c)(1) makes non-core proceedings subject to de novo review by the district court, retention would delay progress of the action (factor 1). *Id.*, at n.4. The Court determines and concludes that discretionary abstention as to the first four causes of action is appropriate,[15] and remand will also be ordered on that basis.

[15] Factors not specifically addressed either weigh in favor of abstention, for the reasons addressed earlier in this opinion in discussing jurisdiction and remand, or are of little weight or concern (for example, factors 3 and 9).

4. Attorney fees

West Wood and Agincourt seek an award of attorneys fees and costs incurred in resisting removal and obtaining remand. They rely on § 1447(c) which states in part: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."

This provision establishes that award of fees is a matter of judicial discretion rather than mandatory. *Billington v. Winograde (In re Hotel Mt. Lassen, Inc.)*, 207 B.R. 935, 943 (Bankr. E.D. Cal. 1997).[16] In exercising its discretion, several factors lead the Court to decline to award fees.

One is the Court's previously stated reluctance to further complicate this already difficult case with collateral litigation over shifting attorneys fees among the litigants unless required to do so. *In re Lake Country Investments, LLC*, 99.4 I.B.C.R. 132, 133 (Bankr. D. Idaho 1999).

Another is the fact that all parties have presented reasoned and credible arguments in support of their positions and in opposition to those of their adversaries. While the Court has determined that remand and discretionary abstention are proper, that conclusion does not require charging APDC and Stewarts with costs and fees. If losing the battle was the sole prerequisite for award of fees, then § 1447(c) would essentially be mandatory any time remand was ordered.

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[16] A finding of bad faith in removal is not necessary for an award of fees under § 1447(c). 207 B.R. at 943, citing *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 445-47 (9th Cir. 1992). However, "[t]he nature of the conduct of the removing defendants is nevertheless relevant to the exercise of discretion." *Id.*

Finally, the Court notes that APDC and Stewarts have resisted remand, but they are not the parties who removed the action. As mentioned above, the conduct of the removing defendants is relevant and, in fact, "central" to the question of awarding fees. *See, e.g., Hotel Mt. Lassen*, 207 B.R. at 943, citing *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993). *Moore* noted that, before its 1988 amendment, § 1447(c) allowed for fees if a case was "removed improvidently and without jurisdiction." 981 F.2d at 446. This would place the focus on the party which actually removed the action and attempted to invoke federal jurisdiction. The change in the statute effected by the amendment, now addressing expenses including attorney fees "incurred as a result of the removal," might be seen as broad enough to include fees against non-removing parties. But the commentary to the 1998 amendments, cited in *Moore*, indicates the focus is still on the acts of the removing party and in some regards replaced the bonding requirement under former § 1446. The Court concludes that this function of the fee shifting provision in § 1447(c) is not served in the circumstances of the instant case.

For these several reasons, the request of West Wood and Agincourt for recovery of fees and costs under § 1447(c) is denied.

B. Motion to dismiss/abstain (Fortress)

Fortress moves to dismiss the counterclaim (which it casts as a third party complaint) asserted against it by APDC . It contends that the Court lacks subject matter jurisdiction over the first four causes of action in the counterclaim seeking damages, and that APDC lacks standing to seek equitable relief under the fifth cause

of action in the counterclaim. As an alternative to the motion to dismiss the first four causes in the counterclaim, Fortress moves the Court to abstain under the mandatory abstention provisions of § 1334(c)(2).

1. Relevance of the partial remand

APDC urged at hearing on June 14 that, if the Court decided to remand the plaintiffs' first four causes of action to the state court, it should decline to rule on Fortress' motion to dismiss the counterclaim, and leave such issues to the state court after remand. The Court generally agrees with the reasonableness of an approach that eschews substantive rulings on actions (or parts thereof) returned to state court. But the question is not quite as simple nor the result as automatic as they would have it.

The amended complaint added two causes of action. The fifth cause of action, was asserted by West Wood and Agincourt against Noyes and against APDC. The sixth cause of action was brought against Noyes, APDC and Stewarts. These two counts are not subject to the partial remand and discretionary abstention, and they presently remain before this Court. The existence of these causes of action by West Wood and Agincourt against APDC gives rise to an ability of APDC to assert counterclaims against West Wood and Agincourt, as well as claims against third parties. The motion of Fortress to dismiss is therefore properly before the Court notwithstanding the remand.

2. Abstention

However, the Court would agree that the "alternative" motion of Fortress to abstain should be reviewed and resolved prior to addressing the balance of the motion to dismiss. In doing so, the Court finds and concludes that the seven elements identified in *Bertagnole* and *Bowen* regarding mandatory abstention under § 1334(c)(2) are here met in regard to the first four "counterclaims." There is a timely motion to abstain; these portions of the counterclaim/third party complaint involve purely state law issues; jurisdiction (if it exists at all) is premised upon the "related to" provisions of § 1334(b); there would be no independent basis for federal jurisdiction absent bankruptcy; there is an action commenced in state court; it may be timely adjudicated; and the state court forum of appropriate jurisdiction exists. The Court concludes that mandatory abstention is required.[17] By virtue of this conclusion, the Court will not rule on the motion to dismiss these four causes of action.

3. Dismissal

The "fifth counterclaim" alleges that all of the claims of the "Alter Ego Counter-defendants"[18] against the Debtor should be equitably subordinated or recharacterized under § 105 and § 510(c). The nature of the claims and the alleged jurisdiction of the Court are thus different from the first four counterclaims, and the second and third elements required for mandatory abstention are lacking. The Court must therefore consider the motion for dismissal.

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[17] The Court would also find discretionary abstention appropriate.

[18] This term encompasses West Wood, Agincourt, WW Holdings, Fortress and Fu. *See,* Answer, Affirmative Defenses, and Counterclaim, at 21.

The motion is brought under Fed.R.Civ.P. 12(b)(6), incorporated by Fed.R.Bankr.P. 7012. Fortress alleges that the fifth counterclaim fails to state a claim upon which relief may be granted for the reason that APDC lacks standing to assert the equitable relief claimed.

In considering such a motion, the allegations of material fact in the complaint (*i.e.,* counterclaim) are taken as true, and construed in the light most favorable to the nonmoving party. *Pond*, 99.3 I.B.C.R. at 116, citing *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997); *Hall v. Sunshine Mining Company (In re Sunshine Precious Metals, Inc.)*, 157 B.R. 159, 160, 93 I.B.C.R. 200, 201 (Bankr. D. Idaho 1993), citing *Westinghouse Electric Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 934 (9th Cir. 1993). Dismissal should not be ordered "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

APDC is an equity holder of the Debtor. It has provided the Court with no authority to establish that such a party has standing to assert the type of equitable subordination action here at issue. The allegations of this fifth counterclaim reflect that APDC believes the interests of secured and unsecured creditors of Lake Country's estate were injured by the acts of the Alter Ego Defendants. *See,* Answer, Affirmative Defenses, and Counterclaim, at 44-45, ¶¶ 62 -64. Relief is sought in the nature of a determination that obligations owed these parties by Lake Country be "equitably subordinated to the legitimate claims of creditors in this estate and/or that such debts be treated as investment to equity in the bankruptcy estate." Answer,

Affirmative Defenses and Counterclaim, at 46, ¶ 6. Such allegations reflect that the injury allegedly suffered, and the remedy therefore, are general to all creditors and parties in interest, and not unique to APDC. The Court concludes APDC lacks standing to pursue this cause. *Variable-Parameter Fixture Development Corporation v. Comerica Bank-California (In re Morpheus Lights, Inc.),* 228 B.R. 449, 452-54 (Bankr. N.D. Cal. 1998) (addressing standing to assert § 510(c) cause of action.)[19] *Accord, Hall*, 157 B.R. at 161-64, 93 I.B.C.R. at 201-04 (addressing lack of standing of creditor to pursue recoveries for general, not specific, injuries.)

The Court concludes that the motion of Fortress to dismiss the "fifth counterclaim" is well taken, and the same shall be granted.

C. Motion to dismiss (Noyes)

Noyes' motion to dismiss[20] the two counts of the amended complaint remaining before the Court is asserted under Fed.R.Bankr.P. 7012 and Fed.R.Civ.P. 12(b)(6). Thus, as noted above, the factual allegations are taken as true and construed in most favorably to the non-moving parties, West Wood and Agincourt.

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[19] *Morpheus Lights* notes that the debtor, through its "management," is the proper party to seek equitable subordination. 228 B.R. at 454. In the present case, APDC is one of two managing members of the Debtor limited liability company. Management is and has for some time been deadlocked. APDC therefore lacks the ability to speak or act conclusively for Debtor in asserting such an action. Perhaps even further to the point, a Trustee has been appointed for the Debtor.

[20] APDC and Stewarts "join" in Noyes' motion. *See* Response and Joinder in Motion to Dismiss, Doc. No. 23. In that pleading, APDC and Stewarts ask that the entirety of the fifth and sixth causes of action be dismissed. *Id.*, at 2.

The two causes of action alleged under the amended complaint are that a February 1996 "redemption agreement" between Noyes and APDC and the related payment of cash to Noyes and the issuance by APDC to Noyes of a note secured by a lien on APDC real estate (real estate later contributed by APDC to Lake Country) constitute a fraudulent conveyance under § 55-913(1)(a), § 55-913(1)(b), and § 55-914(1), Idaho Code, and an illegal distribution of corporate assets under §§ 30-1-631 and 30-1-640, Idaho Code.

The underlying contention is that Noyes was a stockholder in APDC and also holder of several notes in connection with shareholder loans to APDC, and in 1995 converted all loans into additional equity in APDC.[21] It's then alleged that, in 1996, Noyes released and surrendered all equity in that corporation for $500,000 in cash and a $1,584,000 promissory note secured by APDC (ultimately Lake Country) real estate. West Wood and Agincourt argue that, as of February 1996, APDC was insolvent, or rendered so by the redemption agreement, and that this redemption agreement constituted either a fraudulent transfer or an illegal distribution when viewed from the perspective of APDC's creditors.

[21] There is a dispute between the parties over the timing of Noyes' surrender of notes, with West Wood and Agincourt arguing that this occurred in 1995 and that Noyes was no longer a creditor (but solely an equity holder) when the February 1996 redemption agreement was effected. Noyes argues that there was effectively one transfer, not two. At this stage, since the matter is before the Court on Noyes' motion to dismiss, the allegations must be construed as plaintiffs contend.

The key to the motion to dismiss is whether the claims of West Wood and Agincourt can be asserted solely on their own behalf or must be alleged and/or pursued on behalf of Lake Country and its creditors.

i. Standing

Noyes alleges that plaintiffs lack standing to pursue the avoidance action and that this right belongs only to the Trustee of Lake Country, Esposito. Noyes observes that the Trustee has already brought an action, the Esposito Adversary, against Noyes on theories including state law fraudulent conveyance and illegal distribution.

The Trustee contends, in the Esposito Adversary, that Lake Country is a creditor of APDC,[22] and that his pursuit of Noyes on the fraudulent conveyance and illegal dividend theories is brought on behalf of Lake Country. Complaint, Adv. No. 00-6057, at 4, ¶ 3.15.[23] Nothing in the complaint itself indicates that the Trustee is

[22] However, Lake Country came into existence after the 1996 transaction at issue. Thus, its rights are those of a "future creditor" rather than a "present creditor" when viewed as of the time of the transfer.

[23] The Court takes judicial notice of the allegations of the complaint in the Esposito Adversary. Fed.R.Evid. 201. Esposito also filed a "Declaration" in the instant case, Doc. No. 30, which repeated the contention that he was suing Noyes based on Lake Country's rights as a creditor of APDC, and not in exercise of any of his avoiding powers. *Id.*, at 2, ¶ 3. However, Esposito is not a party to the instant suit. Submission of pleadings by non-parties to an action is improper. (The Court appreciates that, apparently since Esposito served the Declaration only on attorneys for West Wood, the following day West Wood's counsel certified service of the Declaration on counsel for APDC and Noyes. *See,* Doc. No. 36. This service by a party doesn't cure the underlying problem.) The Declaration will not be considered.

exercising any rights or powers under provisions of the Bankruptcy Code, including avoidance powers under § 548 or § 544.[24]

While § 544(b)[25] allows a trustee to use state fraudulent conveyance statutes to avoid certain transfers, that does not necessarily mean that, every time a trustee alleges a cause under such state statutes, § 544(b) is invoked. A trustee may simply be exercising a right belonging to a debtor, the right to bring a suit under state law against a third party.

Noyes argues that *Duck v. G.B. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987) and *Christensen v. St. Paul Bank for Cooperatives (In re Fulda Independent Co-op)*, 130 B.R. 967 (Bankr. D. Minn. 1991) require the conclusion that the subject causes of action belongs to the estate, and may not be prosecuted by individual creditors. However *Mankin* concerned a trustee's action to set aside an allegedly fraudulent transfer by the debtor. It established that the trustee's use of state law as a basis of attack as permitted by § 544(b), instead of using § 548, did not render the action non-core. It did not establish the broader proposition urged by Noyes.

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[24] There is a reference to "§ 544" in the title of the pleading and on the Adversary Case Cover Sheet. However, nothing in the complaint substantiates any relevance of § 544 to the action, and the Court sees the reference as having no consequence.

[25] Section 544(b) allows a trustee to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is avoidable under applicable law by a creditor holding an unsecured claim" allowable in the debtor's case. No transfer of the Debtor, Lake Country, or any obligation incurred by Lake Country, is at issue.

The Court sees similar difficulties in Noyes' reliance on *Fulda Independent Co-op*. While there, unlike *Mankin*, the plaintiffs were creditors and not the debtor's trustee, the transfer at issue was still a transfer of the debtor's assets (the defendant being the recipients of the contested transfer). *Fulda* states, in part: "The gravamen of this cause of action is a transfer of assets which, had Debtor retained them, could have been used to satisfy creditors' claims." 130 B.R. at 973. *Fulda* thus does not control this situation.

Hall v. Sunshine Mining is also urged by Noyes as supporting dismissal of the amended complaint. In that case, the plaintiff was a putative class representative of the holders of silver indexed bonds issued by Sunshine Precious Metals, Inc. (SPMI). SPMI was the debtor in bankruptcy. Hall sued Sunshine Mining, SPMI's parent corporation, and individual officers and directors of SPMI alleging that the recapitalization of SPMI was a fraudulent transfer and/or illegal distribution. The Court held that all creditors of SPMI, the debtor, were similarly impacted and thus SPMI (which as debtor in possession had the powers of the trustee) should prosecute the action. It therefore dismissed the adversary proceeding. 157 B.R. at 161-62. The Court stated:

> To summarize: A creditor of a debtor does not have standing to assert an action against a third party if the creditor has only suffered a general injury, common to all creditors and derivative of the injury to the debtor, and if the trustee (or debtor in possession) has standing to assert the cause of action against the third party. The first issue in this case, then, turns on whether the asserted causes of action involve injury particular to the plaintiff (and the other bondholders), or whether they are general causes of action that might be asserted by any creditor.

157 B.R. at 163-64, 93 I.B.C.R. at 203.

Two causes were asserted: state law fraudulent transfer and state law illegal dividend or corporate distribution. The plaintiff bondholders alleged that the nondebtor defendant, Sunshine Mining Company (the parent company of SPMI) and its officers and directors were liable on those causes. The Court held:

> The right to a cause of action under the Texas Fraudulent Transfer Act is a general one, properly asserted by the debtor in possession. The nature of the claim under this section is such that injury to any creditor is only derivative of the primary injury to the debtor; that is, each creditor is only hurt to the extent that the debtor's financial position has been worsened by the alleged fraudulent transfer. Such injury is not particular to any one class of creditors; it strikes at all creditors of the debtor equally.

157 B.R. at 164, 93 I.B.C.R. at 204. The Court reached the same conclusion in regard to the allegations of illegal dividend or distribution. *Id.*

But for *Hall* to apply and control here, APDC would have to be the debtor in bankruptcy, and plaintiffs be viewed as attempting to unilaterally assert claims for generalized injuries of all APDC's creditors, which APDC's trustee, as a representative of such creditors, had sole authority to pursue.

Were the Trustee and the plaintiff creditors here all pursuing avoidance of a transfer of property "of the debtor" (i.e., Lake Country), these cases cited by Noyes might lead to the conclusion that West Wood and Agincourt as individual creditors lack standing. However, the facts as set forth in the pleadings and construed in favor of the non-moving parties do not lend themselves to that characterization.

The Court concludes that whether or not Lake Country, as a creditor of APDC, might have a claim against Noyes, APDC and Stewarts[26] does not foreclose the possibility that other creditors of APDC might also have such claims. The suit of the Trustee is not an exercise of his avoidance powers. The motion to dismiss, to the extent based on the argument that West Wood and Agincourt usurp the exclusive standing of the Trustee, shall be denied.

ii. Additional asserted grounds

Noyes' motion to dismiss, Doc. No. 2, alleged but two grounds: that the claims asserted by West Wood and Agincourt belonged to the Debtor, Lake Country, and were being already prosecuted by the Trustee in the Esposito Adversary, and that the suit by these plaintiffs would be stayed under § 362. This latter contention is based on the first, *i.e.*, that the right to sue to avoid the allegedly improper transfer constituted property of the estate of the Debtor, Lake Country. However, since the Court has concluded that the plaintiffs are not asserting a claim belonging exclusively to the Trustee, it would not appear that they are asserting dominion over property of the Debtor's estate in violation of § 362(a)(3) as Noyes contends. No other aspect of § 362(a) appears implicated, and the motion to dismiss on this ground will be denied as well.

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[26] The claim against the Stewarts is only under the illegal distribution cause, based on their alleged ratification of APDC's actions. Only APDC and Noyes are sued under the state fraudulent conveyance statute.

In briefing Noyes makes yet another standing argument,[27] contending that, by virtue of the "one-action rule" of Idaho Code § 6-101, West Wood's secured claims, must be foreclosed upon before West Wood may pursue any other relief concerning its claim. Noyes thus urges that West Wood cannot exercise any rights of a creditor to bring suit under chapter 9 of Title 55, Idaho Code.[28]

The one action rule is a limitation on the ability of a real estate mortgagee to pursue its mortgagor/debtor directly on the secured debt without first (or simultaneously) looking to recover upon its real estate security. It is codified at § 6-101 of the Idaho Code.[29]

The function of the rule is to protect the original debtor from a multiplicity of suits on debts secured by a mortgage, and requires the mortgagee to exhaust the security before seeking a deficiency judgment. *Eastern Idaho Production Credit Association v. Placerton, Inc.,* 100 Idaho 863, 868, 606 P.2d 967, 972 (1980). Even if one were to assume a connection between West Wood's claims against APDC under state fraudulent conveyance or illegal distribution statutes and West Wood's claims against APDC on a secured obligation (a connection by no means absolutely

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[27] Reply Memorandum in Support of Dismissal, Doc. No. 38, at 5-6.

[28] Though the brief discusses only the fraudulent conveyance claim, there is no reason to believe that Noyes would not also view the one-action rule as an impediment to maintenance of the illegal distribution claim.

[29] That section also sets forth, at § 6-101(3) numerous acts and proceedings available to such a creditor which will not constitute "actions" in violation of the rule. This listing is not exclusive, and thus the absence of a reference in § 6-101(3) to fraudulent transfer or illegal distribution suits is not controlling.

clear at this stage), this has no bearing on West Wood's ability to pursue Noyes as the alleged recipient of an improper transfer. Noyes is not a party protected by the one action rule.

The motion to dismiss is not well taken in this regard, and the same will be denied.

D. Consolidation of adversary proceedings

West Wood and Agincourt ask that the Court consolidate these two nonremanded counts of the present adversary with the Esposito Adversary. This, like certain other matters, arises only in briefing, and no motion for consolidation has been filed. Fed.R.Civ.P. 42(a); Fed.R.Bankr.P. 7042.[30] Esposito in his Declaration "joins" in the non-existent consolidation motion of West Wood and Agincourt, and also urges, should these creditors' suit against Noyes be dismissed, they be allowed to intervene in the Esposito Adversary.

Noyes has argued that, if dismissal is granted, consolidation is rendered moot. But Noyes has not stated a position as to consolidation in the event the Esposito Adversary and the instant case as against Noyes both survive, which is at least for the moment the situation.

It is appropriate to observe that, in the event both the Esposito claims on behalf of Lake Country as a creditor of APDC, and the claims of West Wood and Agincourt as creditors of APDC, proceed to further hearing and/or trial, consolidation may be

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[30] Nor has there been a request of West Wood or Agincourt to intervene in the Esposito Adversary.

advisable under Rule 42(a).[31] But the Court concludes that the proper course is to refrain from rendering ruling at this time on the question of consolidation. There are no motions presently before the Court in proper form, and further developments or considerations may impact the issue.

III. CONCLUSION AND ORDER

In accord with the foregoing decision:

1. Based upon lack of subject matter jurisdiction, the first four claims of the amended complaint removed to this Court will be remanded to the state court, § 1452(b), and this Court further shall abstain from hearing the same, § 1334(c)(1).

2. The request of West Wood and Agincourt for award of attorneys fees in connection with such remand, § 1447(c), will be denied.

3. The motion of Fortress for an order of abstention pursuant to the mandatory abstention provisions of § 1334(c)(2) will be granted in regard to the first four counterclaims asserted by APDC.

4. The motion of Fortress for an order dismissing the fifth counterclaim of APDC under Rule 12(b)(6) will be granted, and that claim will be dismissed.

5. The motion of Noyes, joined in by APDC and Stewarts, to dismiss the fifth and sixth counts of the amended complaint under Rule 12(b)(6) will be denied.

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[31] Rule 42(a) provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Counsel for West Wood, Agincourt and Fortress shall submit proposed forms of orders on Nos. 1, 3, 4 and 5, above. Counsel for APDC and Stewarts shall submit a proposed form of order on No. 2, above.

Dated this 10th day of July, 2000.

TERRY L. MYERS
UNITED STATES BANKRUPTCY JUDGE